IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN SIMMONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5896

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

EILEEN F. SHAPIRO
Assistant Attorney General
of Counsel

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BRIEF FOR PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, the County Court of Ulster County, New York, and the Woodbourne Correctional Facility, pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on January 29, 1977, and orders denying petitioners' motion for rehearing containing a suggestion for rehearing en banc entered on February 1, 1978.

Decisions Below

The orders of the United States Court of Appeals denying petitioners' motion for reargument containing a suggestion for rehearing en banc were entered on February 1, 1978 and are reproduced in Appendix A. The decision of the Court of Appeals is reported at 568 F. 2d 998, and is reproduced in Appendix B. The decision of the District Court, which was affirmed by the Court of Appeals, is unreported and is reproduced in Appendix C. The decision of The Court of Appeals of the State of New York, captioned *People* v. *Lemmons,* is reported at 40 N Y 2d 505, and is reproduced in Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, § 1254(1). The orders of the Court of Appeals denying petitioners' motion for reargument containing a suggestion that the petition be reheard en banc were entered on February 1, 1978.

Questions Presented

1. Whether New York Penal Law § 265.15(3), which permits the presumption that a handgun found in a car is possessed by all the occupants of the car, may be declared unconstitutional on its face by a lower federal court despite a decision of the Court of Appeals of the State of New York upholding the statute's constitutionality.

2. Whether the constitutionality of New York Penal Law § 265.15(3) is properly reviewable by federal habeas corpus petition in light of respondents' failure to object to an incomplete jury charge as well as their deliberate waiver of their automatic right of appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2).

Statement

A.

The Arrest

Respondents and Jane Doe, a sixteen year old girl, were driving in a borrowed car on the New York State Thruway on March 28, 1973 when they were stopped by State Police for speeding. The driver, respondent Lemmons, produced a temporary New York registration certificate and Michigan driver's license. A radio check indicated Lemmons to be a fugitive from Michigan on a weapons charge. He was therefore arrested and placed in a patrol car.

At this point one Trooper Askew returned to the vehicle Lemmons had been driving. As Askew peered through the front window on the passenger side, he observed the butt of a handgun protruding from an open handbag resting on the floor between the front seat and the door of the car. Askew opened the door and seized a loaded .45 automatic pistol, beneath which he found a loaded .38 revolver. The remaining three occupants were then arrested. A subsequent search of the vehicle's trunk disclosed a loaded machine gun and more than a pound of heroin. Respondents were indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a machine gun and unlawful possession of a loaded handgun (two counts).

B.

The Pre-Trial Suppression Motion

After a pre-trial hearing, the trial court denied respondents' motion to suppress the seized contraband. In its decision, the court held that the arrest of Lemmons on the fugitive warrant was valid; that the seizure of the handguns, exposed to open view as they were, was proper; that the arrest of all occupants of the automobile for possession of the handguns was lawful; and that their joint involve-

ment in such handgun charges furnished the police probable cause for the warrantless search of the car trunk.

C.

The Trial

At the trial the prosecution relied upon statutory presumptions to establish respondents' constructive possession of the handguns, the machine gun and the heroin.

No evidence was offered by respondents or Jane Doe to rebut New York Penal Law § 265.15(3), which sets forth the statutory presumption applicable to the possession of a loaded firearm or other dangerous weapon, although they produced some evidence to rebut the presumption that they were in constructive possession of the machine gun and heroin.

At the close of the case, the judge charged the jury that it might rely upon the statutory presumptions to find respondents guilty of possession of the firearms and the heroin. However, the judge failed to charge the jury that § 265.15(3)(a) provides that the presumption does not apply when the handgun is found on the person of one of the occupants of the car. Respondents failed to object to the charge as given, nor did they offer any proposed instruction relating to the "on the person" exception set forth in this provision.*

The jury acquitted the respondents of the first two counts of the indictment, but found them guilty of both counts of unlawful possession of a loaded handgun. At the sentencing proceeding, held on June 28, 1974, respondents were sentenced to a maximum term of seven years on each of the two counts, to run concurrently.

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* The trial judge invited exceptions to the charge three times. There was also a lengthy colloquy covering other aspects of the charge. Nevertheless, the respondents, individually represented by counsel, did not even hint that the court was in error in failing to charge the "on the person" exception.

Jane Doe was adjudicated a youthful offender and given five years probation.

The State Court Appeals

Respondents' convictions were affirmed (3-2) by the Appellate Division, Third Department, 44 A D 2d 243 (1975). The majority affirmed without opinion. The dissenters agreed that the seizure of the gun was valid on a "plain view" theory but concluded that the presumption in § 265.15(3) was inapplicable to petitioners, as the handguns were "upon the person" of Jane Doe, and thus the exception contained in § 265.15(3)(a) applied.

The New York Court of Appeals affirmed the conviction. *People* v. *Lemmons*, 40 N Y 2d 505, 354 NE 2d 836 (1976). The court, after discussing the conditions which prompted the Legislature to enact the statute, clearly stated the basis for its affirmance as follows:

> "[T]he trial court never charged the jury with respect to the 'on the person exception.' Nevertheless the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated *we cannot conclude in this case that as a matter of law the presumption was inapplicable.*" 40 N Y 2d at 512. (emphasis supplied)

In a separate opinion, Judge Jones explicitly restated the narrow basis for the court's affirmance as follows:

> "But no reference was made in the charge to the statutory provision that the presumption would not apply 'if such weapon . . . is found upon the person of one of the occupants.' No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case.

"Accordingly, in the procedural posture in which these verdicts were returned there can only be an affirmance." 40 N Y 2d at 513.

Opinion of the United States District Court for the Southern District of New York

On April 19, 1977, the United States District Court for the Southern District of New York (OWEN, J.) granted respondents habeas corpus relief. Although Judge Owen did not decide whether § 265.15(3) was unconstitutional on its face, he applied the test set forth in *Leary* v. *United States*, 395 U.S. 6 (1969), to the facts of the case and found that possession could not reasonably be inferred from the presence of the handguns in Jane Doe's open purse. He then concluded that as a matter of law, the trial judge was in error in denying the respondents' motions to dismiss at the conclusion of the state's case.

Opinion of the United States Court of Appeals for the Second Circuit

Before reaching the substance of respondents' constitutional claim, the panel of the court below considered and rejected petitioners' procedural arguments. The court first countered petitioners' argument that respondents failed to exhaust their "facial unconstitutionality" claim, raised for the first time in the United States District Court, by concluding that respondents' claim in state court that the statute was unconstitutionally applied to the facts of their case was so closely related to their federal claim that the exhaustion requirement was satisfied.

The court also rejected petitioners' argument that respondents waived their right to argue the facial unconstitutionality of the presumption upon federal habeas corpus review because their failure to object to the trial court's charge, insofar as it omitted a recitation of the "on the person" exception, and indeed their failure to urge in the

state appellate courts that the jury had been charged incorrectly, prevented those tribunals from reaching the merits of their constitutional claim.

After thus concluding that respondents' claim that the statute was facially unconstitutional was properly before it, the court below proceeded to declare the statute unconstitutional on the grounds it could not find any rational basis to support the presumption.

Motion for Reargument With a Suggestion for Rehearing En Banc

As the panel of the court below ruled that the issue of the presumption's facial unconstitutionality had indeed been raised and decided in the New York Court of Appeals, petitioners urged in their motion for reconsideration that respondents thus waived their right to federal review by foregoing automatic appeal to this Court pursuant to 28 USC § 1257(2). Petitioners' motion for reargument with a suggestion for rehearing en banc was denied on February 1, 1978.

REASONS FOR ALLOWANCE OF WRIT

POINT I

The decision below, declaring New York Penal Law § 265.15(3) unconstitutional on its face, although the statute had been upheld by the Court of Appeals of the State of New York, creates a grave conflict between the state and federal courts, departs from the well established principle that a court should restrain from formulating a rule of constitutional law broader than required by the facts before it, and is not in accord with prior decisions of this Court upholding statutory presumptions.

—A—

The decision below is in direct conflict with an earlier decision of the New York Court of Appeals upholding the constitutionality of New York Penal Law § 265.15(3). *People* v. *Russo,* 278 App. Div. 98 (1st Dept.), *aff'd,* 303 N.Y. 673, 102 N.E. 2d 834 (1951). As the lower federal courts do not exercise appellate jurisdiction over state tribunals, *U.S. ex rel. Lawrence* v. *Woods,* 432 F. 2d 1072 (7 Cir., 1970), *cert. denied,* 402 U.S. 983 (1971), the ruling of the state court controls. *People* v. *Molloy,* 21 A D 2d 904 (2nd Dept. 1964); *Walker* v. *Walker,* 51 A D 2d 1029 (2nd Dept. 1976). The obvious judicial dilemma caused by this conflict between the highest court of the State of New York and the United States Court of Appeals for the Second Circuit can only, and in fact, must be resolved by this Court, *U.S. ex rel. Lawrence* v. *Woods, supra.*

The necessity of a resolution of this conflict between the state and federal courts reaches beyond the constitutional question presented by this case. Several other sections of New York's Penal Law permit a presumption of possession to flow from occupancy of a vehicle or room containing

contraband.* The decision of the court below not only subjects many convictions under these statutes to collateral attack in the federal courts, but creates uncertainty and confusion among the police, prosecutors, judges and defense counsel charged with construing these statutes. Furthermore, the denial of certiorari in this case will most certainly result in the prosecution and imprisonment of individuals who will later successfully challenge their convictions in the federal courts.

—B—

Judge Timbers' concurring opinion below contains a cogent analysis of the restraints which preclude a court from "formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States* v. *Raines,* 362 U.S. 17 (1959) citing *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioner of Emigration,* 113 U.S. 33, 39 (1885). *See Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-12 (1973); *Ashwander* v. *T.V.A.,* 297 U.S. 288, 347 (1936). Judge Timbers also correctly points out that only in extraordinary circumstances, such as when first amendment interests are implicated, may a court depart from the normal conditions of constraint. Such extraordinary circumstances are seldom encountered in cases involving the criminal process. *See* Note, THE FIRST AMENDMENT OVERBREATH DOCTRINE, 83 HARV. L. REV. 844, 854, n. 33 (1970). In fact, in the area of criminal justice the federal courts are particularly constrained from precipitously declaring a state statute unconstitutional.

Only recently, in *Patterson* v. *New York,* —— U.S. ——, 45 U.S.L.W. 4708 (U.S. June 17, 1977), this Court stressed

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* *E.g.,* New York Penal Law §§ 220.25; 265.15(1); 265.15(2).

the primacy of the states in the administration of criminal justice, and the respect to be accorded their statutes:

> "It goes without saying that preventing and dealing with crime is much more the business of the states than it is of the Federal Government, . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is 'normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" 45 U.S.L.W. at 4709 (citations omitted).

In harmony with the doctrine articulated in *Patterson, supra,* this Court has consistently dismissed appeals from decisions of the New York Court of Appeals upholding the constitutionality of criminal presumptions. *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576, *appeal dismissed for want of a substantial federal question,* 342 U.S. 938 (1952); *People* v. *Kirkpatrick,* 32 N Y 2d 17, 295 N.E.2d 753, *appeal dismissed for want of a substantial federal question,* 414 U.S. 948 (1973). In fact, the presumption upheld in *Terra,* now contained in New York Penal Law § 265.15(1), is virtually identical to the one at issue herein. Although the court below attempted to distinguish *Terra* from the instant case by claiming that New York law defines occupants of a room more narrowly than occupants of a car, neither the statutes themselves nor any judicial construction thereof makes such a distinction.

In *People* v. *Kirkpatrick, supra,* this Court was asked to consider the constitutionality of New York Penal Law § 235.10 subd. 1, which provides that a person who sells obscene material in the course of his business is presumed to do so with knowledge of both its contents and its obscene character.

Judge Fuld's vigorous dissenting opinion in the New York Court of Appeals, in which Judges Jones (who concurred in the instant case) and Wachtler joined, not only found that the presumption violated defendants' due process rights, but was blatantly violative of the defendants' first amendment rights as well. Thus the Court's dismissal of this appeal is especially persuasive, in view of the favored status usually accorded first amendment interests. *See* Note, THE FIRST AMENDMENT OVERBREATH DOCTRINE, *supra.*

—C—

The proper test for the constitutionality of a presumption has been most definitively set forth by this Court in *Leary* v. *United States,* 395 U.S. 6 (1969), when after reviewing its previous decisions as to the constitutionality of presumptions, it concluded:

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36 (footnote omitted).

This Court has also cautioned that the judgment of the legislature in determining the rationality of the relationship between the proved fact and the presumed fact should be accorded great weight by the courts, provided this judgment is based upon common experience or reliable empirical data. *Leary* v. *United States, supra* at 39; *United States* v. *Gainey,* 380 U.S. 63 (1965).

The statutory history of New York Penal Law § 265.15(3) shows that this presumption, far from being either irrational or arbitrary, has a sound basis in both "common sense and experience", *Barnes* v. *United States,* 412 U.S. 837, 845 (1973). The New York State Legislature first enacted this presumption into law in 1936 as Penal Law

§ 1898-a, in response to Governor Lehman's anti-crime program, which he introduced by special message to the Legislature in January of that year. PUBLIC PAPERS OF GOVERNOR LEHMAN, 95 (1936). In his memorandum approving the bill, PUBLIC PAPERS, *supra* at 459, the governor noted that this amendment to the Penal Law had been urged for years, particularly by the State Crime Commission, the courts, and police commissioners throughout the state. In 1960, The Joint Legislative Committee on Firearms and Ammunition was created by concurrent resolution of the New York State Assembly and Senate, "to undertake a comprehensive examination and study of all laws pertaining or in any way relating to or affecting the sale, possession and regulation of firearms and ammunition and the administration of such laws." NEW YORK LEG. DOC. No. 29, 9 (1962). During the life of the Committee, it conducted an intensive analysis of the laws of the fifty states, the New York statutes and the judicial constructions thereof. An advisory committee composed of representatives of The New York State Bar Association, County Judges Association, Izaak Walton League, New York State Police, District Attorneys Association, New York State Sheriff's Association, The New York State Rifle and Pistol Association and The New York State Conservation Council worked closely with the Commission in its efforts to revise New York's firearms legislation. Numerous public hearings were held throughout the state, and a fifty point questionnaire was distributed to each of the sixty-two district attorneys, nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs. Both the public hearings and the questionnaire sought to elicit expert opinion on specific proposals to amend, standardize and conform to judicial construction New York's existing firearms statutes. In 1963 the new statute drafted by the Commission was enacted into law as New York Penal Law § 1899 (L. 1963, ch. 136), and the historic Sullivan Law

repealed. While the presumption at issue herein was carried forward into the new statute, the "on the person" exception now set forth in 265.15(3)(a) was added at that time.

Thus, the New York State Legislature, both in reenacting the presumption and amending it to include the enumerated exceptions to its application, had the benefit of the vast experience of those individuals and institutions most expert in the enforcement and interpretation of New York's gun presumption statute. It should be noted that American Law Institute has approved a presumption regarding possession of criminal instruments in automobiles which is almost identical to the one at issue herein. MODEL PENAL CODE § 5.06(3).

In substituting its own judgment for the informed judgment of the New York State Legislature, the courts below have prohibited the application of the presumption to even the most egregious circumstances, such as when loaded large caliber firearms are on open display in an automobile occupied by more than one person. While the lower court posed the remote hypothetical case wherein the presumption might be applied to a hitchhiker arrested while a passenger in a car containing a concealed Derringer or Barretta, 568 F.2d 1007, it failed to consider that New York Courts have *always* applied the presumption on a case by case basis, *e.g. People* v. *Garcia,* 41 A D 2d 560, 340 N.Y.S. 2d 25 (2nd Dept., 1973); *People* v. *Alston,* —— Misc. 2d ——, N.Y.L.J. April 19, 1978 p. 12 col. 5 (Sup. Ct., Bronx Cty.); *People* v. *Anonymous,* 65 Misc. 2d 288 (Dist. Ct., Nassau Cty., 1970) (presumption applied to a controlled substance).

Moreover, it should be emphasized that the presumption is rebuttable. It merely permits an inference that, in the absence of some explanation, the occupants of an automobile at the time a gun is found within it are in possession of the gun, unless one of the exceptions applies. Even if no

contrary proof is offered, the presumption is not conclusive and may be rejected by the jury. The prosecution at all times retains the burden of proof to establish guilt beyond a reasonable doubt. *People* v. *Leyva,* 38 N Y 2d 160, 168-169, 341 N.E.2d 546 (1975); *People* v. *Terra, supra.* No burden of proof is ever shifted.

The court below places great reliance upon this Court's decision in *United States* v. *Romano,* 382 U.S. 136 (1965). However, a distinction may be easily made between the presumption at issue in *Romano* and New York Penal Law § 265.15. In *People* v. *Leyva, supra,* wherein the New York Court of Appeals upheld the constitutionality of a presumption involving possession of a controlled substance, otherwise identical to § 265.15(3), that court distinguished the presumption in *Romano* from presumptions flowing from presence in an automobile:

> "Indeed the unique and mobile nature of automobiles, and their role in drug traffic also serves to distinguish the case before us from the circumstances found in *United States* v. *Romano,* 382 U.S. 136, 86 S. Ct. 279, 15 L. ed. 2d 210. *Romano* is further distinguishable in that it involved a statute aimed at those who possess or control the manufacturing process rather than at possession of an illegal substance such as drugs (cf. *Leary* v. *United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L.Ed. 2d 57, *supra; Turner* v. *United States,* 396 U.S. 398, 90 S. Ct. 642 L.Ed. 2d 610 *supra*) and in that it involved imputed possession of large stationary equipment rather than of small, easily transferable packages. As the court's cases in this area make clear, each presumption's rationality must be judged within its own context." 38 N Y 2d at 167, n. 2.

Finally, in *United States* v. *Gainey,* 380 U.S. 63 (1965), decided just a year before *Romano, supra,* this Court affirmed the constitutionality of a statute which permitted

the presumption of carrying on the business of a distiller to flow from unexplained presence at the site of an illegal still.

It is respectfully submitted that the lower court both misconstrued this Court's reasoning in *Romano, supra,* and improperly substituted its own "common experience" for that of the Legislature in order to strike down a statute that has been carefully considered by the Legislature and upheld by the New York Court of Appeals. It is thus a matter of the most grave importance that petitioners' application for certiorari be granted.

POINT II

The failure of respondents to object to the incomplete jury charge as well as their failure to appeal as of right from the decision of the New York Court of Appeals implicitly affirming the constitutionality of New York Penal Law § 265.15(3) constitutes a waiver sufficient to bar habeas corpus relief.

A.

The decision of the court below clearly undercuts the bypass doctrine recently clarified by this Court in *Wainwright* v. *Sykes,* —— U.S. ——, 45 U.S.L.W. 4087 (U.S. June 23, 1977). While the lower court points approvingly to "the advantages that flow from informing a trial judge of the possibility of unconstitutional error at a time when action can be taken to correct it", it attempts to distinguish the instant case from *Wainwright* by concluding that unlike Sykes' failure to make a timely objection under Florida's contemporaneous objection rule, the failure of respondents here to make a timely objection to the incomplete charge did not prevent their claims from being fully considered by the New York Court of Appeals. This "bootstrap" argument must be rejected for two reasons. First, five judges of the New York Court of Appeals clearly stated

that they were *unable* to reach the merits of the respondents' "as applied" claim because of the incomplete charge not objected to. Thus, what the court below described as the "federalism interest" was never vindicated.

Even more importantly, this Court clearly intended *Wainwright* to apply to the precise situation presented by this case. It is likely that if the jury had been properly charged with the "on the person" exception, that charge coupled with the presence of the guns in Jane Doe's purse, would have affected its disposition since the jury acquitted respondents of the machine gun and heroin possession charges solely on the evidence that the trunk was locked and no key had ever been recovered. Justice Rehnquist, who wrote for the majority in *Wainwright,* recognized this precise point in his footnote in *Mullany* v. *Wilbur,* 421 U.S. 684 (1975), in which he states:

> "While *Fay* v. *Noia,* 372 U.S. 391, 9 L Ed. 2d 837, 83 S. Ct. 822 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, *failure to object to a proposed instruction should stand on a different footing.* It is one thing to fail to utilize the appeal process to cure a defect which already infers on a judgment of conviction, *but it is quite another to forego making an objection or exception which might prevent the error from ever occurring.* Cf. *Davis* v. *United States,* 411 U.S. 233, 36 L. Ed. 2d 216, 93 S. Ct. 1577 (1973)." (emphasis supplied). 421 U.S. at 704.

B.

If the court below is correct in its analysis that despite respondents' failure to object to the incomplete jury charge, the New York Court of Appeals implicitly upheld the constitutionality of New York Penal Law § 265.15(3), respondents were therefore entitled to automatic review of

that decision by appeal to the Supreme Court of the United States under 28 U.S.C. § 1257(2). Unlike the Supreme Court's certiorari jurisdiction, which is discretionary, this Court would have "had no discretion to refuse adjudication of the case on its merits. . . ." *Hicks* v. *Miranda,* 422 U.S. 322, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication on the merits of the very claim presented in this habeas corpus proceeding.

If respondents had taken the appeal to which they were entitled, and had received the "actual adjudication" of the constitutional claim they now present, to which they were also entitled, they would be barred from relitigating the same claim in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c) which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari a state prisoner has had the federal redetermination to which he is entitled." *Neil* v. *Biggers,* 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing a petitioner to obtain *one* federal determination" of his federal constitutional claims. *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 459 F. 2d 745, 749 (2d Cir. 1972), *cert. denied sub nom., Ross* v. *Radich,* 409 U.S. 1115 (1973) (emphasis supplied). Thus there can be no dispute that this case would not be before this Court today had respondents taken their appeals of right to the Supreme Court from the New York Court of Appeals in 1976.

Last term, in *Wainwright* v. *Sykes, supra,* this Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a subsequent federal habeas corpus proceeding. This Court held that the prisoner would be barred from presenting that claim "absent a showing of cause for the

non-compliance and some showing of actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes, supra,* 45 U.S.L.W. at 4811. The Court noted that this test was more restrictive upon the prisoner than the "deliberate bypass" test set forth in dicta in *Fay* v. *Noia,* 372 U.S. 391, 438 (1963) and expressly stated that "[i]t is the sweeping language of *Fay* v. *Noia* . . . which we today reject." *Wainwright* v. *Sykes, supra,* 45 U.S.L.W. at 4812.

The test of *Wainwright* v. *Sykes, supra,* applies to respondents' failure to obtain a final *federal* determination of their present claim from this Court on direct appeal. In fact, the Court's analysis of its holding in *Wainwright* applies with equal or greater force to this situation even though (indeed, *because*) it was a federal rather than state determination which respondents waived.

Moreover, the state's interest in the "finality of criminal litigation" extends far beyond this case. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 265.15(3) was applied as well as convictions obtained pursuant to the other "presumption of possession" statutes in New York's Penal Law. If the statute is ultimately invalidated, a serious possibility exists that the Court's decision would apply retroactively. See *Hankerson* v. *North Carolina,* 432 U.S. 233 (1977); *Ivan V.* v. *City of New York,* 407 U.S. 203 (1972). In that case, the delay in the determination of the constitutional issues raised herein—due *solely* to respondents' failure to take their appeal of right to the Supreme Court—would put New York to the enormous unnecessary expense of retrying as many as hundreds of prisoners convicted in cases involving these presumptions in the period since this Court would have decided this issue on direct appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
April 26, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

EILEEN F. SHAPIRO
Assistant Attorney General
of Counsel

Appendix A—Orders of the United States Court of Appeals Denying the Petition for Rehearing Containing a Suggestion for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of February, one thousand nine hundred and seventy-eight.

77-2059

Samuel Allen, Raymond Hardrick and Melvin Lemmons,

Petitioners-Appellees

v.

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York,

Respondents-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondents-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

Appendix A—Orders of the United States Court of Appeals Denying the Petition for Rehearing Containing a Suggestion for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of February, one thousand nine hundred and seventy-eight.

Present: HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges

HON. JOHN F. DOOLING,
District Judge

77-2059

Samuel Allen, Raymond Hardrick and Melvin Lemmons,
Petitioners-Appellees

v.

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York,
Respondents-Appellants.

A petition for a rehearing having been filed herein by counsel for the respondents.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Appendix B—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 158—September Term, 1977.

(Argued September 15, 1977 Decided November 29, 1977.)

Docket No. 77-2059

SAMUEL ALLEN, RAYMOND HARDWICK
and MELVIN LEMMONS,
Petitioners,

—against—

COUNTY COURT, ULSTER COUNTY, NEW YORK WOODBOURNE CORRECTIONAL FACILITY, Woodbourne, New York,
Respondents.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,*
and DOOLING, *District Judge.**

Appeal from the issuance by the District Court for the Southern District of New York, Richard Owen, *Judge,* of a writ of habeas corpus setting aside petitioners' convictions by the State of New York of felonious possession of a firearm in violation of the N.Y. Penal Law § 265.05(2) (McKinney's 1967) (now § 265.02(4), McKinney's 1976-77 Supp.) on the ground that N.Y. Penal Law § 265.15(3) (McKinney's 1976-77 Supp.), which makes the presence of

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

a firearm in an automobile presumptive evidence of its possession by all persons occupying the car at the time when the weapon is found, is unconstitutional as applied in this case.

Affirmed on the ground that N.Y. Penal Law § 265.15(3) is unconstitutional on its face.

EILEEN SHAPIRO, Assistant Attorney General, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Lillian Z. Cohen, Assistant Attorney General, New York, N.Y., of counsel), *for Respondents.*

MICHAEL YOUNG, Esq., New York, N.Y. (Goldberger, Feldman & Breitbart, New York, N.Y., of counsel), *for Petitioners.*

MANSFIELD, *Circuit Judge:*

The principal issue in this case is the constitutionality of a New York statute which makes the "presence in an automobile . . . of any firearm . . . presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found, except under the following circumstances: (a) if such weapon . . . is found upon the person of one of the occupants therein. . . ."[1] Judge Richard Owen of the Southern District of

[1] N.Y. Penal Law § 265.15(3) (McKinney's 1976-77 Supp.) provides:

"3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, black-

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New York granted appellees' application as state prisoners for a writ of habeas corpus on the ground that this statutory presumption was unconstitutional as applied in their state trial for felonious possession of a loaded firearm, N.Y. Penal Law §265.05(2) (McKinney's 1967) (now found at § 265.02(4) (McKinney's 1976-77 Supp.)). Because we conclude that the presumption is unconstitutional on its face, we affirm.

On March 28, 1973, an automobile driven by appellee Lemmons, in which appellees Allen, Hardrick and one "Jane Doe"[2] were passengers, was stopped by State Police for speeding on the New York State Thruway. When the car was stopped Lemmons was in the driver's seat, Jane Doe in the right front seat, and Allen ond Hardrick in the back seat. After Lemmons had left the car and had been arrested for reasons not relevant here,[3] one of the police

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jack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occuying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumptoin shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

The only difference between this provision and the one that was applicable during the appellees' trial is the addition of chuka sticks to the list of weapons to which the presumption applies.

[2] Ms. Doe, a juvenile, was tried with the appellees, convicted and sentenced to five years probation. Her case is not before us.

[3] When the car was pulled over, Lemmons produced his driver's license. A radio check indicated—mistakenly as it turned out—that he was wanted on a fugitive warrant from Michigan, and he was arrested for that reason.

officers returned to the car, looked through the front window on the passenger's (Doe's) side, and saw part of a handgun protruding from a ladies' handbag resting on the floor of the car next to the right front door. A search of the handbag revealed a loaded .45 automatic pistol and a loaded .38 revolver.[4] Appellees and Doe were indicted by the State of New York, tried before a jury in the Ulster County court and convicted of felonious possession of these two weapons in violation of N.Y. Penal Law § 265.02(2). At trial the prosecution relied entirely on the statutory presumption to establish the defendants dominion or control over the guns,[5] introducing no evidence other than appellees' presence in the car in which the handbag containing the guns was also present to demonstrate possession.

At the close of the state's case appellees moved to dismiss the indictment, arguing that the presumption did not apply to them, since the guns had been "found upon the person" of Jane Doe within the meaning of that exception to the presumption. See N.Y. Penal Law § 265.15(3), quoted in fn. 1. This motion was denied. Thereafter, in its instructions the court informed the jurors of the statutory presumption and that they could "infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the

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[4] A subsequent search of the trunk of the car in which the appellees were riding uncovered a machine gun and more than a pound of heroin, but Jane Doe and the appellees were all acquitted on charges arising out of this search.

[5] The State has argued on occasion that the large caliber of these guns was some evidence that Jane Doe, a 16-year old girl, was not their owner. Even if the inference is accepted, of course, it reveals nothing about the identity of the person or persons for whom Doe may have been holding them—be it appellees or some unknown third party or parties.

time when such instruments were found," but omitted any reference to the statute's "upon the person" exception. No objection to the omission was voiced. After a guilty verdict had been returned, appellees moved to set it aside and to dismiss the indictment, renewing their claim that the presumption was inapplicable to them as a matter of law and arguing in addition that, if the presumption were found applicable, it was unconstitutional as applied. This motion was also denied.

Appellees' convictions were affirmed by the Appellate Division, Third Department, *People* v. *Lemmons,* 49 App. Div. 2d 639, 370 N.Y.S.2d 243 (1975), two of the five judges dissenting in part, and by the New York Court of Appeals, *People* v. *Lemmons,* 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976), with two judges dissenting in part. The latter court held that the evidence bearing on applicability of the presumption had warranted submission of the question to the jury but declined to go further, noting that the defendants had failed to object to the omission of the "upon the person" exception from the jury charge. Although the majority opinion did not explicitly deal with the issue, it implicitly upheld the statute's constitutionality, discussing its legislative history and the reasoning behind its enactment. The defendants had contended before the Appellate Division and the Court of Appeals that the statute was unconstitutional as applied, citing *Leary* v. *United States,* 395 U.S. 6 (1969), in support of their argument that "a presumption must be regarded as 'irrational' or 'arbitrary,'' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to defend." (Defendants' brief before App. Div., p. 23, and brief before Court of Appeals, p. 20) Moreover, Judges Wachtler and Fuchsberg main-

tained in dissent that the presumption could not constitutionally be applied in this case.[6] 40 N.Y.2d at 513-16.

Appellees thereafter filed their petition for a writ of habeas corpus in the Southern District of New York, claiming that New York's presumption was unconstitutional both on its face and as applied to their case and that the failure to charge the jury as to the possible applicability of the "upon the person" exception constituted a denial of due process.[7] Judge Owen issued the writ, holding that the statutory presumption was unconstitutional as applied.[8]

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[6] The New York Court of Appeals could not, of course, simply ignore appellees' constitutional claim and thereby force them to undertake another round of state court litigation. E.g., *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975) ("State courts need not have definitively ruled on the merits of the issues raised by a petitioner seeking federal habeas corpus relief; rather, it is sufficient that the state courts have been *properly presented* with the *opportunity* to rule on the issues."); see *United States* v. *Fay*, 333 F.2d 815 (2d Cir. 1964).

[7] Because we find the presumption unconstitutional, we need not reach either (1) the question of whether the appellees forfeited their claim based on the court's failure to instruct regarding the "on the person" exception by failing to object to the trial judge's charge on this basis, see *Wainwright* v. *Sykes*, 45 U.S.L.W. 4807 (1977), or (2) the merits.

[8] In addition, Judge Owen, noting that the statutory presumption does not operate when the weapon is found "upon the person" of another occupant, suggested that this exception would apply in the present circumstances, since the contents of Doe's handbag, including the weapons, would necessarily be upon her person. However, since federal courts may grant habeas corpus relief to a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), a state court finding as to the sufficiency of evidence—in this case the evidence on the issue of whether the weapons were on Doe's person—rarely presents the kind of federal question cognizable on habeas corpus. See p. 563, *infra*. More-

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On appeal, the State argues (1) that the issue of the presumption's constitutionality on its face is not properly before this court because of the appellees' alleged failure to exhaust state remedies with regard to this claim, (2) that the presumption is in any event facially valid, and (3) that Judge Owen's holding that the statute was unconstitutional as applied was an improper ruling on an issue of state law. Because of the grounds of our disposition, we need deal only with the first two contentions.

Discussion

An applicant for federal habeas relief must first exhaust available State remedies before filing his application. 28 U.S.C. §2254(b)-(c); *Fay* v. *Noia*, 372 U.S. 391, 434-35 (1963). However, "petitioners are not required to file 'repetitious applications' in the state courts." *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) per curiam); *Brown* v. *Allen*, 344 U.S. 443, 448-49 n.3 (1943). "Once a federal question has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard* v. *Connor*, 404 U.S. 270, 275 (1971). Nor is a habeas petitioner required to pursue available state remedies for collateral

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over, the majority opinion of the New York Court of Appeals took the view that the placement of the weapon in Doe's handbag did not necessarily indicate that she was "in sole and exclusive possession of the weapon." Appellants here point to other circumstances—the large calibers of the two weapons, the tender age of Doe (16 years) and the protrusion of the gun from her bag—as support for an inference by the jury that as a young "moll" she was holding the guns for the others or that, upon the car being flagged down by the police, they stuffed their guns into her bag in order to avoid being caught with the weapons on their adult persons, knowing that she would be treated as a youthful offender.

attack if he has persented his federal claims to the state courts on direct appeal. *United States ex rel. Newsome* v. *Malcolm*, 492 F.2d 1166, 1169 & n.4 (2d Cir. 1974), *aff'd. sub nom. Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975).

In this case appellees have consistently argued, both at their state trail and on appeal, that the presumption was unconstitutional as applied to them.[9] However, appellants urge that appellees' contention here that the presumption

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[9] The memos of law submitted by the appellees to the New York trial and appellate courts each contained the following passages:

> "Second, if the presumption is applicable here, then it is unconstitutional as applied.
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> "In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36. . . .
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> "Assuming that the presumption is constitutional on its face, (*People* v. *De Leon*, 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no 'substantial assurance' that a defendant in a car is more likely than not to know what is on the person of other occupants of the car. . . .
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> "In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. . . .

We note that even though these papers do not explicitly argue the facial constitutionality of the presumption, the state was uncertain during oral argument as to whether the issue had been raised. However, because habeas corpus petitioners bear the burden of demonstrating that they have exhausted state remedies, e.g., *Baldwin* v. *Lewis*, 442 F.2d 29, 35 (7th Cir. 1971); *Bond* v. *Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976), we will assume that the issue was not pressed apart from the appellees' contentions regarding the presumption's constitutionality as applied.

is unconstitutional on its face represents a "different" claim that was not presented in the state courts. The state remedies, the argument goes, were therefore not exhausted. However, as the Supreme Court pointed out in *Picard* v. *Connor*, in determing whether a claim raised in habeas proceedings is substantially the same as that preveiously presented to the courtts of a state,

> *"Obviously, there are instances in which 'the ultimate question for disposition' . . . will be the same despite the variations in the legal theory or factual allegations urged in its support.* A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." (Emphasis added.) 404 U.S. at 275, 277-78.

Applying this principle to the present case, we conclude that the "ultimate question for disposition" posed by appellees' argument that the presumption is unconstitutional its face is not substantially different from that presented by their claim in the state courts to the effect that the statute is unconstitutional as applied. The fundamental question in either case is whether there exists a sufficient empirical connection between the "proved fact," here the presence in a car of a gun, and the "presumed fact," here its possession by all occupants of the car. Compare *Leary* v. *United States*, 395 U.S. 6. 29-54 (1969) (facial constitutionality of a presumption), with *Turner* v. *United States*, 396 U. S. 398, 418-19 & n.39 (1970) (constitutionality as applied). While the factual inquiry may be somewhat more constrained in an "as applied" adjudication, see p. 562-64 *infra*, New York certainly cannot complain that its courts

have not had the "first opportunity" to rule on the legislative facts underying its presumption.[10]

Our conclusion that the issue of the presumption's constitutionality has been "fairly presented to the state courts" is wholly consistent with the equitable nature of the exhaustion requirement. This prerequisite to the writ should not be construed as the functional equivalent of the formalities associated with common law pleading. "The exhaustion requirement is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement." *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973). "The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson, supra,* 404 U.S. at 250. In this case, New York has had an "initial opportunity" to rule on the rationality of the connection between presence in a car with a gun and possession of it; to require more would not serve the interests of federalism but would

[10] The substantial equivalence of the claims asserted before the state and federal courts in this case is apparent by contrast to those cases in which this court has found that a new claim has been presented in a federal habeas corpus proceeding. See, e.g., *Fielding* v. *LeFevre,* 548 F.2d 1102 (2d Cir. 1977) (a state court claim that sentence was excessively harsh not the equivalent of a habeas claim that the trial judge had chilled exercise of right to trial); *Mayer* v. *Moeykens,* 494 F.2d 855, 858-59 (2d Cir.), *cert. denied,* 417 U.S. 926 (1974) (claim that police lacked probable cause for an arrest different from claim that warrant was insufficient); *United States ex rel. Nelson* v. *Zelker,* 465 F.2d 1121, 1125 (2d Cir.), *cert. denied,* 409 U.S. 1045 (1972) (argument that joint trial of co-conspirators constituted a denial of due process reformed on habeas into a *Brady* claim).

undermine habeas corpus as a "swiftt and imperative remedy."

Moreover, it is readily apparent that an application for state collateral review in the present case would be a wholly futile exercise. First of all, since the New York Court of Appeals has refused to declare the presumption unconstitutional as applied to a situation in which weapons, although in the same car as the occupants, were in the handbag of another person (Doe), it is inconceivable that that court would reverse its field to hold that the statutory presumption, which may be applied in circumstances less favorable to the occupants than those present here, is nevertheless facially unconstitutional. Secondly, in *Stubbs* v. *Smith,* 533 F.2d 64 (2d Cir. 1976), although we found it unnecessary to pass upon the merits of a habeas petitioner's constitutional challenge to the very presumption before us, we declined to require the petitioner to exhaust state court remedies on that issue, even though he had not previously raised it, since the New York Court of Appeals had already rejected the substance of the petitioner's legal position in previous cases, see *People* v. *Russo,* 303 N.Y. 673, 102 N.E.2d 834 (1951); *People* v. *Leyva,* 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975), and it had given no indication at the time of his federal petition that it would reconsider its previous holdings. 533 F.2d at 69.[11]

[11] Although a New York trial court may entertain a motion to vacate a prior judgment on the ground that it was "obtained in violation of a right of the defendant under the constitution . . . of the United States," N.Y. Crim. Proc. L. § 440.10(1)(h), such a motion must be denied if the court finds that no adequate appellate review of the ground for relief occurred because of a defendant's "unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." *Id.* § 440.10(2)(c). In the present case appellees' reasons for not urging the facial unconstitutionality

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To require exhaustion in these circumstances would serve no policy associated with federalism, but would frustrate appellees' efforts to recover their liberty promptly.

For closely analogous reasons, we also conclude that appellees have not forfeited the right to argue the facial unconstitutionality of the presumption before the federal courts. See generally *Wainwright* v. *Sykes*, —— U.S. ——, 45 U.S.L.W. 4807 (1977). They have persistently pressed a substantially equivalent position before three different courts in New York, and it would be unreasonable for us to conclude that, although they need not pursue further state remedies because they have already confronted the state courts with the "ultimate question for disposition before us," their efforts were not sufficient to avoid a forfeiture of federal relief. *Wainwright*, which represents the Supreme Court's latest word on procedural forfeitures in habeas cases, although severely limiting the

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of the statutory presumption are that it was implicit in the constitutional claim raised and that the substance of the claim had been rejected in earlier cases. We believe that in this context appellees would find it extremely difficult, if not impossible, to persuade the state courts to reach the merits of their claim of facial unconstitutionality upon any motion to vacate sentence which we might require them to file.

Such a motion to vacate sentence must also be denied if the trial court finds that "the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment. . . ." N.Y. Crim. Proc. L. § 440.10(2)(a). If we were to require further recourse to state proceedings, and the state trial court were to find (as would not be unlikely that the New York Court of Appeals had implicitly disposed of the issue of facial validity when it found the presumption constitutional as applied, the irony would be apparent. State prisoners who, by hypothesis, had been told by us that they had failed to present a claim to the state courts would be informed by the state that their claim had already been determined on the merits.

applicability of the *Fay* v. *Noia* "deliberate bypass" standard, is consistent with our decision on this issue. In *Wainwright* the petitioner sought habeas relief on the ground that a confession read into evidence at his state court trial had been obtained in violation of his *Miranda* rights. However, he had failed to object to its admission at the trial. The Supreme Court held that the failure to comply with Florida's "contemporaneous objection" rule barred fedeal habeas corpus review of his *Miranda* claim, absent any showing of "cause" for the procedural default and "prejudice" resulting from it. The Court explained that its new standard for procedural forfeitures was justified because Florida's rule "deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right"—chiefly the advantages that flow from informing a trial judge of the possibility of constitutional error at a time when action can be taken to correct it. 45 U.S.L.W. at 4812-13.

Here, neither *Wainwright* rationale is implicated. As we indicated above, whatever federalism interest New York may have had in a first opportunity to pass on the facial validity of its presumption was fully vindicated when the New York Court of Appeals was presented with the claim that it was unconstitutional as applied. Moreover, to consider the facial validity of the presumption here would not jeopardize the orderly presentation of claims of constitutional error to the New York trial courts; the State has never argued that it was not alerted to the possibility that its statute could not be used against the appellees in time to take appropriate action during their trial.

Having concluded that the question of the constitutionality of the New York presumption on its face is properly before us, we turn to the merits.

The substantial equivalent of the New York presumption of possession of a weapon by occupants of an automobile based upon its presence in the car was first enacted in 1936,[12] some years before a series of Superme Court cases redefined the constitutional standards by which statutory presumptions are to be judged. When the legislature first acted, the most current statement of the law was *Morrison* v. *California,* 291 U.S. 82 (1934), a case in which the defendants were charged with violation of a statute prohibiting alien possession of agricultural property and the Court considered the constitutionality of a California statute which shifted to them the burden of proving their citizenship or eligibility for it once the State had shown that they possessed agricultural property. Justice Cardozo's opinion explained that the constitutionality of presumptions or regulations of the burden of proof depended on a variety of circumstances, of which two were paramount:

> "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception." 291 U.S. at 90-91.

However, in *Tot* v. *United States,* 319 U.S. 463 (1943), decided seven years after the enactment of the New York presumption here at issue, the Court, in nullifying a statutory presumption to the effect that possession of a firearm shall be presumptive evidence of its transportation or receipt in interstate commerce, shifted its position on the

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[12] 1936 N.Y. Laws, ch. 390.

permissible justifications for presumptions:

> "[T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.
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> "The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . .
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> "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the

existence of all the facts essential to guilt. This is not permissible. . . .

"Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." 319 U.S. 467-68, 469-70.

Subsequent cases echo *Tot* and leave no doubt that a state may not erect a presumption simply because evidence of a fact necessary for a criminal conviction is more likely to be available to a defendant than to the prosecution. *Leary* v. *United States,* 395 U.S. 6, 32-34, 44-45 (1969); *Turner* v. *United States,* 396 U.S. 398, 408 n.8 (1970); *Barnes* v. *United States,* 412 U.S. 837, 846 n.11 (1973).[13]

Beginning with *Tot,* therefore, the Supreme Court has emphasized that the constitutionality of a statutory pre-

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[13] The Supreme Court has also repudiated the notion that merely because the legislature could criminalize an act it may make that act presumptive evidence of a criminal offense. *Tot* v. *United States, supra,* 319 U.S. at 472; *Leary* v. *United States, supra,* 395 U.S. at 34, 37; *United States* v. *Romano,* 382 U.S. 136, 142-44 (1965); *Turner* v. *United States, supra,* 396 U.S. at 407-08 n.8. Here, therefore, it does not matter whether New York might have made presence in a car with a gun criminal.

sumption turns on the substantiality of the relation between the fact activating the presumption (the proved fact) and the presumed fact. In *United States* v. *Gainey,* 380 U.S. 63 (1965), and *United States* v. *Romano,* 382 U.S. 136 (1965), the Court applied without much elaboration the *Tot* test, which required simply that there be "a rational connection between the fact proved and the ultimate fact presumed," to two federal statutes that "deemed" presence near a still to be sufficient evidence of crimes involving illegal distilling operations. In *Gainey* the Court found the requisite "rational connection" between presence near a still and the broad substantive offense of "carrying on the business of a distiller." In *Romano,* by contrast, the Court noted that the crime of possession was a much narrower offense than that at issue in *Gainey,* and concluded that the relation between presence near and possession of a still was "too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary' . . . *Tot* v. *United States,* 319 U.S. 463, 467." 382 U.S. at 141.

In *Leary* v. *United States, supra,* the Court undertook to clarify the meaning of the *Tot* rational connection standard. After reviewing its cases, the Court summarized their teachings as follows:

> "The upshot of *Tot, Gainey,* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36.

Applying this standard, the Court declared invalid a statutory presumption, 21 U.S.C. § 176a, authorizing the jury to infer from a person's possession of marijuana that the

defendant had knowledge of its unlawful importation into the United States.[14]

Leary's reasoning elucidates the judicial inquiry that must be undertaken when a presumption is challenged as unconstitutional. The Court noted that "the congressional determination favoring the particular presumption must, of course, weigh heavily," 395 U.S. at 36, but it engaged in a lengthy independent discussion of the documentary evidence bearing on the sources of marijuana consumed in this country—and their relative importance—and the likelihood that a possessor of that drug would be aware of its origins, *id.* at 37-54. The clear implication was that appellate courts may not simply accept on faith a legislative assertion that proved and presumed facts are related; rather, it must satisfy itself, with facts developed through judicial notice if necessary, see *United States* v. *Gonzales,* 442 F.2d 698, 707 & n.4 (2d Cir. 1971) (en banc), *cert. denied sub nom. Ovalle* v. *United States,* 404 U.S. 845 (1971), of a presumption's empirical validity.

Finally, in *Turner* v. *United States,* 396 U.S. 398 (1970), the Court applied the analysis unveiled in *Leary* to a variety of similar statutory presumptions involving heroin and cocaine. The first principle of *Leary* was reiterated: A presumption must be declared unconstitutional "unless it can at least be said with substantial assurance that the

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[14] The Court also raised the possibility that a presumption satisfying the "more likely than not" test might also be required to satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depended upon the presumption's use, but declined to reach the issue because the presumption at issue failed to meet even the less stringent test. 395 U.S. at 36 n.64. We decline to reach this issue in this case for the same reason; we hold that New York's presumption does not satisfy the "more likely than not" test.

presumed fact is more likely than not to flow from the proved fact," 396 U.S. at 405.[15]

Under the New York statutory presumption at issue in the present case the presence of a gun in a car (the proved fact) constitutes "presumptive evidence" of its possession by all persons occupying the car (the presumed fact). N.Y. Penal Law § 10.00(8) defines the term "Possess" as meaning "to have physical possession or otherwise to exercise dominion or control over tangible property,"[16] and this definition has been restated in cases involving firearms as requiring that the gun be "within the immediate control and reach of the accused, and where it is available for unlawful use if he so desires." E.g., *People* v. *Lemmons,* 40 N.Y.2d 505, 509-10, 354 N.E.2d 836, 387 N.Y.S.2d 97, 100 (1976); *People* v. *Lo Turco,* 256 App. Div. 1098, 11 N.Y.S.2d 644, *aff'd.,* 280 N.Y. 844, 21 N.E.2d 888 (1939).

Applying the standards established by the Supreme Court, this statutory presumption must be declared unconstitutional on its face unless it can be said with substantial assurance that an inference of possession (as thus defined) of a gun by a car's occupants is more likely than not to flow from the gun's presence in the vehicle. We fail to find any rational basis for such an inference, either in logic or experience. There is nothing about the simultaneous presence of occupants and a gun in an automobile that makes it more likely than not that the former control the latter or that they even know of its presence. The presumption obviously sweeps within its compass (1)

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[15] Later, in *Barnes* v. *United States,* 412 U.S. 837, 841-43, 845 n.8 (1973), the Court reviewed the standards governing statutory presumptions and made them broadly applicable to so-called "common law inferences"—permissible inferences charged by a trial judge without specific statutory authorization.

[16] The jury in this case was charged with this definition.

many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it. Nothing about a gun, which may be only a few inches in length (e.g., a Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitchhikers or other casual passengers, much less that they have any dominion or control over it.[17] Although New York has created exceptions to the presumption for three situations in which it would be especially anomalous to infer possession—where the gun is found upon the person of one of the occupants, where the weapon is found in an automobile being operated for hire by a licensed driver, and where one of the occupants has a license to carry the weapon—the presumption remains irrational in that class of cases in which it does apply.

Indeed, this case is strikingly similar to *United States* v. *Romano, supra,* in which the Court struck down a federal presumption deeming presence near a still sufficient evidence to sustain a conviction for possession, custody or control of that still. See 26 U.S.C. § 5601(a)(1), (b) (1970) (since amended). Just as the *Romano* Court noted that presence near a still is not a wholly innocent circumstance, we would agree that the presence of a gun in a car may cast some suspicion on all of its occupants. Even so, *Romano* said

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[17] In fact, during the trial of this case, the jury was charged pursuant to parallel presumptions that they could infer that all four occupants of the car had possession of heroin and a machine gun found in the trunk of the car, see note 3, *supra,* even though a key to the trunk was never recovered from any of them. The jury acquitted all of the defendants on these counts.

> "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. . . . Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is aribtrary. . . .' *Tot* v. *United States,* 319 U.S. 463, 467." 382 U.S. at 141.

By the same token, in this case presence would be relevant and admissible evidence in a trial on a firearm possession charge. But absent some additional showing, its connection with possession is too tenuous to permit a reasonable inference of guilt.

Although we are cognizant of the sensitive nature of our function in this case, that of reviewing the constitutional validity of a state statute, and of the deference ordinarily due to legislative judgments regarding the connection between proven and presumed facts, see p. 555, *supra,* we find the State's efforts to justify this statute to be without merit. Although the State asserts that this presumption meets the *Leary* test, the only background for this statute to which we have been referred indicates that it was passed to facilitate prosecution of the alleged crime by forcing occupants of a car to come forward with evidence regarding possession and not because of any empirical association between the presumed fact and the proved fact. For example, the New York Court of Appeals' opinion in this case remarked,

> "To resolve the issue, we first look to the history underlying the statute. . . . Under traditional rules, developed in a motorless age, criminal possession of a weapon was not established unless the weapon was

'within the immediate control and reach of the accused, and where it is available for unlawful use if he so desires'. (*People* v. *Persce,* 204 N.Y. 397, 402, 97 N.E. 877, 878.) Difficulties arose when a weapon was found secreted under the seat, in the glove compartment or in the trunk of an occupied automobile. Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it. For example, in one 1930 case, the police intercepted an automobile and found a revolver under the driver's seat. The court, in applying the relevant standards, was compelled to release all defendants for failure to sufficiently establish possession. (*People ex rel. De Feo* v. *Warden,* 136 Misc. 836, 241 N.Y.S. 63.) The court remarked, however, that the case and other similar situations 'establishes the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession.' (136 Misc. 836, 241 N.Y.S. 63.) In 1936, the Legislature took heed of this suggestion and enacted section 1898-a of the former Penal Law providing that all persons in an automobile at the time a weapon is found in the vehicle are presumed to be in illegal possession of the weapon. (L.1936, ch. 390.)'' 40 N.Y.2d at 509-11.

But the notion that a presumption may be created simply because defendants may have superior access to relevant evidence was abandoned in *Tot* and has never been revived. The New York Court's opinion does not assert that possession of a gun and occupancy of a car containing it are closely linked; on the contrary, the opinion notes that "traditional analysis *precluded a finding* that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it." *Id.* (emphasis added). In short, nothing in the *Lemmons* decision or others upholding the presumption demonstrates that the state courts or legislature have ever attempted to justify this firearm presumption as *Leary* requires. See also *People* v. *Russo,* 278 App. Div. 98, 103 N.Y.S.2d 603, *aff'd.,* 303 N.Y. 673, 102 N.E.2d 834 (1951).[18]

Appellant's reliance on *People* v. *Terra,* 303 N.Y. 332, 102 N.E.2d 576 (1951), *app. dismissed,* 342 U.S. 938 (1952), in which the Supreme Court dismissed for lack of a substantial federal question a case in which a somewhat similar presumption—making the presence in a room of a machine gun presumptive evidence of its possession by all occupants of the room—had been upheld by the New

[18] In *People* v. *Leyva,* 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975), the New York Court of Appeals did uphold a parallel presumtion, which made the presence in a car of a controlled substance presumptive evidence of its knowing possession by all the car's occupants, N.Y. Penal L. § 220.25; see also *Leyva* v. *Superintendent,* 428 F. Supp. 1 (E.D.N.Y. 1977), and its opinion was somewhat more sensitive than *Lemmons* to the nature of the *Leary* test. Without expressing any opinion on the validity of *Leyva,* we note the following distinctions between that case and this one: First, the *Leyva* court had before it a report indicating that the New York legislature may have actually found the connection required by *Leary.* See 38 N.Y.2d at 166-67. Here, we have been shown nohing suggesting that the legislature made any such judgment. Second, the *Leyva* court adopted that report's suggestion that anyone transporting large quantities of drugs would be very unlikely to allow a person not in joint possession to accompany him. Here, a gun—while not wholly innocent—is not so incriminating that one would decline to allow those not having custody of it to ride with it. Finally, it is significant that Judge Fuchsberg, who wrote the majority opinion in *Leyva,* dissented from the New York court's decision in this case.

York Court of Appeals, is misplaced. Apart from the fact that the Supreme Court's disposition in *Terra* predated *Gainey, Romano, Leary,* and *Turner,* the case is clearly distinguishable.[19] In *Terra,* the New York court defined "persons who occupy a room" very narrowly, as encompassing only individuals "who either reside in it or use it in the conduct and operation of a business or other venture." 303 N.Y. at 335. With the class of person to whom the presumption could apply so circumscribed, the *Terra* court could rationally conclude that such people would be more likely than not to know what was in a room and enjoy sole or joint possession of its contents. By contrast, in this case, the term "persons occupying" a car extends indiscriminately to casual passengers and others with no long-term association with it. Thus, the similarity between the presumption involved in *Terra* and the one before us is more verbal than real.

Finally, contrary to the State's assertion, it makes no difference that the presumption before us is rebuttable. *Tot, Gainey, Romano, Leary,* and *Turner* all involved rebuttable presumptions. The evil of the presumptions that the Supreme Court has struck down has not been that they could not be dispelled, but rather that they forced defendants to meet inferences that could not rationally be drawn from the facts proved.

For these reasons we hold that, because it cannot be said with substantial assurance that the presumed fact (possession of a gun by occupants of an automobile) is more likely than not to flow from the proven fact (presence of the gun in the car) the New York presumption making the latter "presumptive evidence" of the former is unconstitutional on its face.

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[19] We express no opinion on whether *Terra* remains viable in view of these Supreme Court cases.

For several reasons we consider it inadvisable to limit our decision, as did the district court, to a holding that the statutory presumption at issue is unconstitutional as applied to the facts of this case. At first blush such an approach has some appeal because it would appear to enable us to avoid possible exacerbation of federal-state relations arising out of our nullification of a state statute by focusing attention narrowly on a set of specific facts, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 844-45 (1970), and requiring that we determine only whether the particular conduct before us is immune and not whether the statute could lawfully be applied to other hypothetical circumstances.

Where the empirical connection between the proved and presumed facts turns on the presence or absence of one or two clearly identifiable circumstances which were left unmentioned by the legislature, e.g., the type and amount of a drug possessed by a defendant, see *Turner* v. *United States,* 396 U.S. 398, 415-18 (1970), we have not hesitated to limit ourselves to an "as applied" holding, upholding the validity of such a statute where the condition is met, see, e.g., *United States* v. *Gonzalez,* 442 F.2d 698 (2d Cir.) (en banc) *cert. denied, sub nom. Ovalle* v. *United States,* 404 U.S. 845 (1971) (over 1 kilogram of cocaine). But when the empirical relationship between proved and presumed facts turns, as in the present case, on a variety of circumstances and on the largely unpredictable combinations in which they occur, the "as applied" approach resembles more a holding as to the sufficiency of the evidence than the "more likely than not" determination required by *Leary.*[20] Such a particularized analysis of the applicability

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[20] In *United States* v. *Tavoularis,* 515 F.2d 1070 (2d Cir. 1975), for example, this court considered the permissibility of an

(footnote continued on following page)

of a presumption would involve us in the nature and quality of the evidence required to uphold a conviction under state law—an issue which we normally eschew on consideration of habeas petitions. E.g., *Terry* v. *Henderson,* 462 F.2d 1125, 1131 (2d Cir. 1972); *United States ex rel. Griffin* v. *Martin,* 409 F.2d 1300, 1302 (2d Cir. 1969); *United States ex rel. Mintzer* v. *Dros,* 403 F.2d 42 (2d Cir. 1967), *cert. denied,* 390 U.S. 1044 (1968).[21]

With these considerations in mind we believe that it would be inappropriate for us in effect to determine whether a more narrowly drawn New York presumption, limited to a more restricted class of cases than that delineated by the state legislature, might be upheld and,

(footnote continued from preceding page)

inference that the defendants knew that treasury bills had been stolen from a bank based on their possession of those bills. The court's discussion of *Leary* and the other relevant precedents was positioned in that portion of the opinion dealing with the sufficiency of the evidence in the case. 515 F.2d at 1074-77.

[21] With due respect, Judge Timbers' characteristically thoughtful opinion tends to underestimate the nature of our reliance on these decisions. Viewed broadly, they reflect the principle that federal courts "are bound by a State's interpretation of its own statute and will not substitute [the federal court's] judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." *Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961). If we were to adopt the solution to this case suggested by Judge Timbers, however, every prisoner to whom this presumption had been applied could effectively challenge the sufficiency of the evidence in his case by claiming that that evidence was insufficient to support the use of the presumption against him. Rather than allow the wholesale conversion of state law issues into due process questions, we have chosen to follow the Supreme Court's holdings in *Leary, Tot, Romano* and *Gainey* in deciding the validity of New York's statute on its face. These cases establish that this mode of adjudication is not limited to situations in which First Amendment values are implicated.

if so, whether the present case would fall inside or outside of the more confined area. Absent direct evidence, an inference of joint possession on the part of occupants depends on many variables, including the number of occupants of the car, the nature of the relationships between them, their ownership or past use of the automobile, their familiarity with it, the size of the vehicle and the size, location and visibility of the gun. The weight to be given to evidence of one or more of many relevant factors, moreover, would turn on the credibility extended to the proof. While we might agree with the district court in this case that the statutory presumption is unconstitutional as applied to the three petitioners, in view of the evidence that the guns (one concealed and one partially exposed) were in Doe's handbag resting on the floor between her and the right front door, we would not want to hypothesize as to which was the pivotal circumstances—the location and ownership of the bag, the position of the bag, the partial exposure of one of the guns or the number of the occupants. The fruitlessness of this approach, which bears all the earmarks of a review of evidence for sufficiency, is readily apparent. In effect the validity of the presumption would be upheld only in instances where the evidence would, independent of the statute, support an inference of possession. For this reason there would be no point in an attempt to save the statutory presumption in part by adding conditions which neither the New York legislature nor the New York Court of Appeals have chosen to supply.

Accordingly we hold that New York's presumption lacks the requisite empirical connection between proved and presumed facts in the class of cases to which the legislature made it applicable. As a result, appellees were denied a fair trial when the jury was charged that they could rely on the presumption in finding possession.

The issuance of the writs of habeas corpus by the district court is affirmed.

TIMBERS, *Circuit Judge,* concurring:

I agree that the judgment of the district court should be affirmed. But I would affirm on the ground that N.Y. Penal Law § 265.15(3) (McKinney 1976-77 Supp.) is unconstitutional *as applied.* That is the ground of Judge Owen's holding. I would not reach the issue as to whether the statute is unconstitutional on its face.

I take it that it is common ground that normally a court should scrutinize the constitutionality of a statute only as applied in the case before it. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-12 (1973); *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Ashwander* v. *TVA,* 297 U.S. 288, 347 (1936) (Brandeis, *J.,* concurring). It is in the unusual case, such as where the very existence of a statute would chill activity protected by the First Amendment, that other principles override the normal considerations of restraint. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852 (1970). ("[D]eparture from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.") The difficulties concomitant to an analysis of the facts of a particular case should not impel us unnecessarily to reach a holding with respect to the constitutionality of a statute on its face.

The majority acknowledges that "[w]here the empirical connection between the proved and presumed facts turns on the presence or absence of one or two clearly identifiable circumstances which were left unmentioned by the legislature . . . we have not hesitated to limit ourselves to an 'as applied' holding, upholding the validity of such a statute where the condition is met. . . ." But the majority then advances what strikes me as the novel proposition that "when the empirical relationship between proved and presumed facts turns . . . on a variety of circumstances and on the . . . combinations in which they occur, the 'as applied' approach resembles more a holding as to the sufficiency of the evidence than the 'more likely than not' determination . . . ." Since the majority correctly notes that we eschew passing on the sufficiency of evidence in habeas corpus proceedings, I should have thought that we would avoid such an approach to constitutional adjudication.

With deference I suggest that the majority's reliance on this Circuit's refusal to consider the sufficiency of evidence in habeas corpus proceedings is misplaced. We have avoided consideration of claims regarding the sufficiency of evidence to uphold a state court conviction because they are "essentially . . . question[s] of state law and [do] not rise to federal constitutional dimensions." *Terry* v. *Henderson,* 462 F.2d 1125, 1131 (2 Cir. 1972); see also *United States ex rel. Griffin* v. *Martin,* 409 F.2d 1300, 1302 (2 Cir. 1969). This reluctance stems from a desire to avoid intrusion into matters properly the province of the state courts. Furthermore, it has the virtue of prudently avoiding unnecessary constitutional showdowns. In the instant case, these very considerations should stay our hand from precipitously striking down the New York presumption wholesale—the most extreme form of exacerbation of federal-state relations. See Note, The First Amendment Overbreadth Doctrine, *supra,* 83 Harv. L. Rev. at 849-52.

Finally, no protected activity would be impaired here by our allowing the presumption to operate where it may do

Appendix B—Decision of the United States Court of Appeals for the Second Circuit.

so constitutionally.[1] Any future abuse of the presumption may be remedied when and if it occurs, in which event I would be willing to do so on the basis of Judge Mansfield's thoughtful analysis of the constitutionality issue as set forth above in the majority opinion.

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[1] In its discussion of *People* v. *Terra*, pages 560-561, *supra*, the majority without ruling on the issue appears to acknowledge that in *some* situations the statutory presumption would be valid.

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 4794

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Petitioners,

—against—

COUNTY COURT, ULSTER COUNTY, NEW YORK, WARDEN, Woodbourne Correctional Facility, Woodbourne, New York.

MEMORANDUM AND ORDER

OWEN, District Judge

Petitioners Allen, Hardrick and Lemmons were convicted on two counts of felonious possession of a gun under N.Y.Penal L. § 265.05(2)[1] in the County Court of Ulster County. They seek a writ of habeas corpus releasing them from custody[2] and setting aside their convictions. The convictions were affirmed on successive appeals, although over strong dissents.[3]

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[1] Now § 265.02(4).

[2] Petitioner Allen is on parole; petitioners Hardrick and Lemmons are presently incarcerated on unrelated charges, not yet having begun to serve their sentences on this conviction.

[3] These convictions were affirmed in 44 App. Div.2d 639, 370 N.Y.S.2d 243 (3d Dept. 1975) and 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976).

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

The three petitioners were driving in a car with one "Jane Doe," a co-defendant below, who was also convicted of possession.[4] Lemmons was driving, with Jane Doe sitting in the right front seat; Allen and Hardrick were in the back seat. When the car was pulled over for a speeding violation, one of the police officers approached the passenger side of the car. There, on the floor of the front seat between Jane Doe's feet and the right hand front door, he observed her handbag with the handle of a gun visible. Upon inspection he found a second gun in the handbag as well. Both were loaded. It is for possession of these guns that petitioners were convicted.

The State conceded on oral argument that the *only* basis for the conviction was the presumption as set forth below:[5]

> New York Penal Law § 265.15(3)
>
> The presence in an automobile . . . of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . . .

Petitioners moved at the close of the People's case, to dismiss both gun-possession counts for insufficient evidence, claiming the presumption did not apply to them.[6] The motion was denied and the court thereafter charged the jury as to the presumption without charging the exception.

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[4] Doe was adjudicated a youthful offender.

[5] *See also People* v. *Lemmons,* 370 N.Y.S.2d at 246 (Greenblott, J., dissenting) and 387 N.Y.S.2d at 104 (Fuchsberg, J., dissenting).

[6] Petitioners relied upon language in § 265.15(3), supra, providing that the presumption is applicable "except under the following circumstances: (a) if such weapon . . . is found upon the person of one of the occupants therein . . .

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

Petitioners now seek a writ of habeas corpus under 28 U.S.C. § 2254 on the ground, *inter alia,* that the presumption of possession in § 265.15(3) as applied to them resulted in an unconstitutional denial of due process.[7]

The test for the constitutionality of a presumption has been stated as whether "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *United States* v. *Leary,* 395 U.S. 6, 36 (1969). There must "be a rational connection between the facts proved and the fact presumed," or a "reasonable relationship to the circumstances of life as we know them." *Tot* v. *United States,* 319 U.S. 463, 467-68 (1943). New York courts similarly define the test. See *People* v. *McCaleb,* 25 N.Y.2d 394, 400-01 (1969).

Thus, here, was it "more likely than not" that from the mere presence of two guns in a woman's handbag, "possession" by three others in the car could be reasonably inferred? I conclude that in the circumstances of life that inference does not reasonably follow.

In addition, I note, as mentioned earlier, that in the very statute under consideration the presumption does not apply when the weapon is found "upon the person" of one of the occupants. In *People* v. *Pugash,* 15 N.Y.

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[7] There has been much discussion in the opinions in the New York Court of Appeals and in the briefs before me concerning the trial judge's failure to charge the jury on the exception to the presumption and petitioners' failure to object to the charge as given. I find that petitioners' trial strategy was in no way inconsistent with their present argument, and in view of the fact that they argued the inapplicability of the presumption to the state appellate courts, failure to object, I find, was not a "deliberate by-pass" of state procedure. *Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *Kibbe* v. *Henderson,* 534 F.2d 493 (2d Cir.) *cert. granted,* 97 S.Ct. 55 (1976). However, I need not reach the charge issue since I find that petitioners' motion to dismiss after the People's case should have been granted.

Appendix C—Decision of the United States District Court for the Southern District of New York, Dated April 19, 1977.

2d 65 (1964), *cert. denied,* 380 U.S. 936, *appeal dismissed,* 382 U.S. 20 (1965), the New York Court of Appeals held that a firearm in a briefcase carried by a person was "concealed upon his person." *A fortiori,* a woman's handbag in a car within her reach is her equivalent of a man's various pockets, and normally entitled to privacy. Its contents are, therefore, necessarily "upon her person."

Having concluded that the presumption is, as a matter of law, inapplicable in this case, and there being no other evidence to support petitioners' conviction, the petition for writ of habeas corpus is granted. The writ shall issue. Submit order.

(Illegible) OWEN
United States District Judge

April 19, 1977.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

PEOPLE v LEMMONS [40 NY2d 505]

Statement of Case

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and JANE DOE, Appellants.

Argued May 5, 1976; decided July 15, 1976

Crimes—possession of dangerous weapon—after vehicle was stopped for speeding and computer check revealed that driver was wanted by authorities of another State, he was placed under arrest for being fugitive from justice, and police officer, seeking to ascertain identity of three other occupants of vehicle, woman in front and two men in back, looked into window on passenger side, and saw woman's open handbag on floor between door and front seat, and portion of pistol protruding therefrom, whereupon passengers were placed under arrest, handbag was searched, and two loaded pistols found therein—driver and three passengers were convicted of two counts of possession of dangerous weapon—convictions were properly affirmed—validity of seizure of weapons does not depend upon legality of driver's arrest under out-of-State warrant which, in fact, had been dismissed prior to incident—weapons came into plain view of officer while he was conducting inquiry which was reasonable under circumstances—issue of whether weapons in handbag, admittedly woman's handbag, were found on her person, in which case statutory presumption that all occupants of vehicle possessed them would be inapplicable, was, in this case, question of fact for jury—although jury was never charged with respect to "on the person" exception, defense counsel did not except to this omission.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

1. Police stopped a vehicle with New York license plates for speeding and, when the driver produced an out-of-State license and no vehicle registration at all, requested a computer check, which revealed that, while the vehicle was "clean", the driver was wanted by the authorities of another State on a weapons violation. He was placed under arrest for being a fugitive from justice, and a police officer, seeking to ascertain the identity of three other occupants of the vehicle, a woman seated in the front and two men seated in the back, looked into the window on the passenger side, and saw a woman's open handbag on the floor between the door and the front seat, and a portion of a pistol protruding from that handbag, whereupon all three passengers were placed under arrest, the handbag was then searched, and two loaded pistols were found therein. Based on possessing those pistols, the driver and the three passengers were all convicted of two counts of possession of a dangerous weapon. Their convictions were properly affirmed.

2. The validity of the seizure of the two weapons does not depend upon the legality of the driver's arrest under the out-of-State warrant, which, in fact, had been dismissed a few days prior to the incident. The weapons came into the plain view of the officer while he was conducting an inquiry which was reasonable under the circumstances, and the seizure of them and subsequent arrest of the passengers were legitimate and constitutional police responses to the situation then confronted.

3. The issue of whether the weapons in the handbag, which was admittedly the woman's handbag, were found on her person, in which case the statutory presumption that all occupants of the vehicle possessed them would be inapplicable, was, in this case, a question of fact for the jury, in view of such factual issues as the precise location of the

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

handbag and the access to it which the others may have had. Absent clear-cut evidence leading to the sole conclusion that it was on her person, it cannot be concluded that, as a matter of law, the statutory presumption was inapplicable.

4. Although the question of the applicability of the statutory presumption was a question for the jury, it was never charged with respect to the "on the person" exception. However, defense counsel did not except to this omission.

People v Lemmons, 49 AD2d 639, affirmed.

APPEALS, by permission of a Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of said court, entered July 14, 1975, which affirmed judgments of the Ulster County Court (RAYMOND J. MINO, J.), rendered upon verdicts convicting defendants of possession of a weapon as a felony (two counts).

J. Jeffrey Weisenfeld for appellants. I. Appellants' motion to suppress the weapons should have been granted. (*United States v Robinson*, 414 US 218; *Gustafson v Florida*, 414 US 260; *United States v McDowell*, 475 F2d 1037; *People v Baer*, 37 AD2d 150; *United States v Arias*, 472 F2d 1, 414 US 864; *Whiteley v Warden*, 401 US 560; *United States v Cox*, 475 F2d 837; *United States ex rel. Mealey v State of Delaware*, 352 F Supp 349; *United States v Canieso*, 470 F2d 1224.) II. The evidence was insufficient to support the conviction of Lemmons, Hardrick and Allen. (*People v Pugach*, 15 NY2d 65, 380 US 936; *People v Davis*, 52 Misc 2d 184; *People v Garcia*, 41 AD2d 560; *Leary v United States*, 395 US 6; *People v Terra*, 303 NY 332, 342 US 938; *People v Reisman*, 29 NY2d 278; *People v De Leon*, 32 NY2d 944.) III. The court's charge on reasonable doubt requires a new trial.

Francis J. Vogt, District Attorney (Michael Kavanagh and *Edward M. P. Greene* of counsel), for respondent. I. Since the findings of the trial court and the jury were affirmed by the Appellate Division and are supported by the record, this court has not power to pass on the factual issue of the trooper's credibility. Furthermore the handguns, were properly seized under the "plain view" doctrine and no search was needed or undertaken. (*People v Maney,* 37 NY2d 229; *People v Oden,* 36 NY2d 382; *People v Leonti,* 18 NY2d 384; *People v Rowell,* 27 NY2d 691; *People v Rivera,* 14 NY2d 441; *People v Cunningham,* 26 AD2d 966; *Whiteley v Warden,* 401 US 560; *People v Lypka,* 36 NY2d 210; *People v Horowitz,* 21 NY2d 55.) II. When the unconcealed handguns were found in the car, the statutory presumption attached to all the occupants thereof and established their guilt beyond a reasonable doubt. In the circumstances of its application here, the presumption is constitutional. (*People v Pugach,* 15 NY2d 65, 380 US 936; *People v Moore,* 32 NY2d 67; *People v Sibron,* 18 NY2d 603; *People v Anthony,* 21 AD2d 666, 379 US 983; *People v Terra,* 303 NY 332, 342 US 938; *People v McCaleb,* 25 NY2d 394; *People v Reisman,* 29 NY2d 278; *People v De Leon,* 32 NY2d 944.) III. In its charge to the jury, the court properly explained the meaning of reasonable doubt. (*People v Jones,* 27 NY2d 222.)

JASEN, J. Defendants Helvin Lemmons, Raymond Hardrick, Samuel Allen and Jane Doe[1] were convicted, after a jury trial, of two counts of possession of a dangerous weapon, two loaded revolvers. The Appellate Division, with two Justices dissenting in part, affirmed the judgments of conviction, without opinion. (49 AD2d 639.) On

[1] A fictitious name for a young woman subsequently adjudicated a youthful offender.

this appeal, all four defendants argue that their motion to suppress the weapons on constitutional grounds should have been granted. In addition, defendants Lemmons, Hardrick and Allen contest the legal sufficiency of the evidence supporting their convictions. There should be an affirmance.

On March 28, 1973, the defendants were riding in a late model passenger car on the New York State Thruway. Melvin Lemmons was at the wheel, with Jane Doe beside him in the front seat and the other two defendants seated in the back. Shortly before 1:00 P.M., while the car was passing through Ulster County, it was detected speeding and a State Trooper signaled the driver to pull the car over to the right side of the road. The patrol car stopped abreast of the Lemmons vehicle on the grassy center mall on the left side of the highway. Officer John Emsing walked over to the car, approached the driver, requested his operator's license, and advised him that the officer was going to issue him a ticket for speeding. Lemmons produced a Michigan driver's license and no vehicle registration at all.[2] Since the vehicle had New York license plates, the officers followed normal procedure by requesting, over the police radio, that the Department of Motor Vehicles check on the operator's license and the car registration. In addition, the officers had their dispatcher submit the infor-

[2] At the suppression hearing, Officer Emsing testified that defendant Lemmons displayed a long since expired temporary registration. On the other hand, Officer Askew stated that no registration at all had been produced. The suppression court credited Officer Askew's version and this finding, as well as the other findings of fact made by the suppression court, were affirmed by the Appellate Division. Thus, our review is restricted to the legality of the weapons' seizure and to the sufficiency of the evidence and we may not consider defendants' arguments, addressed to alleged factual contradictions. (See, e.g., *People v Maney,* 37 NY2d 229, 233.)

mation to the National Crime Information Center computer. Although the State department reported that the vehicle was "clean", the computer check revealed that Lemmons was "wanted by the police department in Detroit, Michigan on a weapons violation". Upon receiving this information, Officer Askew, the second State policeman in the patrol car, crossed the highway, placed Lemmons under arrest for being "a fugitive from justice", brought him over to the patrol car and placed him in the back seat. Officer Askew then returned to the Lemmons vehicle in order to ascertain the identity of its three remaining occupants: "I had three other unknown people. Obviously, I have to get their names". He walked around the vehicle to the passenger's side and looked into the window. He spotted a woman's handbag on the floor of the car between the door and the front seat. A portion of a .45 caliber automaic pistol was protruding from the open handbag. The officer then placed the three passengers under arrest. A subsequent search of the handbag established that there were two loaded automatic pistols inside, the criminal possession of which all four defendants have been held accountable.

All defendants contend that the arrest of Melvin Lemmons was invalid and, since the "search" of the car was incident to his arrest, the evidence of handgun possession should have been suppressed. Reliance is placed on the fact that the Michigan warrant upon which Lemmons' arrest was predicated had been dismissed a few days prior to this incident. In our view, the validity of the seizure of the two weapons does not turn upon the legality of Lemmons' arrest under the dismissed Michigan warrant.[3] We sustain

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[3] In light of our resolution of the issue, we do not decide whether Lemmons' arrest was, in fact, valid. (See *People v Lypka*, 36 NY2d 210, 214; *People v. La Pene*, 40 NY2d 210, 223-224.)

the seizure upon the ground that the weapons came into the plain view of the State policeman as he was conducting a legitimate police inquiry.

The standard by which the constitutionality of seizure and search is measured is whether the actions of the police were reasonable in light of all the circumstances. (*Cady v Dombrowski*, 413 US 433, 448; *People v. Kreichman*, 37 NY2d 693, 697; see *People v Moore*, 32 NY2d 67, 69, cert den 414 US 1011.) Here, the seizure of the handguns was not the product of a search, for the only search ever conducted by the State Police officers was a frisk of Lemmons' person for weapons. The handguns, rather, came into the plain view of an officer conducting an inquiry that was reasonable under the circumstances. Lemmons, the driver of the car, had been apprehended speeding, did not possess a valid vehicle registration and was apparently wanted by the authorities of another State. Confronted with these facts, the officers were entitled, if not obligated, to ascertain the identity of his three traveling companions. (See *People v De Bour*, 40 NY2d 210, 218-219.) This, and no more, is what the officer sought to do. In performing his duty, the officer observed a weapon in a handbag within open view. The seizure of the bag and its contents and the subsequent arrest of the three passengers were legitimate and constitutional police responses to the situation then confronted. (See *People v Singleteary*, 35 NY2d 528; *Ker v California*, 374 US 23, 42-43;; cf. *People v Brosnan*, 32 NY2d 254, 260.)

Turning to the second issue on this appeal, the three male defendants contend that there is insufficient evidence to establish that they were in possession of the handbag containing the weapons. The fourth defendant, Jane Doe, is precluded from raising this argument because of her voluntary admission that the handbag was hers. To support the convictions of the three men, the People rely on

subdivision 3 of section 265.15 of the Penal Law which provides, insofar as it is relevant here, that the presence of a firearm in a private automobile, other than a stolen vehicle, "is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except • • • if such weapon, instrument or appliance is found upon the person of one of the occupants therein". Defendants argue that the handbag of Jane Doe was a part of her person and, thus, the statutory presumption is inapplicable.

To resolve the issue, we first look to the history underlying the statute. Since the automobile is itself of relatively recent origin, it was not until the second and third decades of this century, when popular use and ownership of motorized vehicles first became widespread, that automobiles came into vogue as an instrument for the furtherance of criminal purposes. Under traditional rules, developed in a motorless age, criminal possession of a weapon was not established unless the weapon was "within the immediate control and reach of the accused and where it is available for unlawful use if he so desires". (*People* v. *Persce,* 204 NY 397, 402.) Difficulties arose when a weapon was found secreted under the seat, in the glove compartment or in the trunk of an occupied automobile. Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it. For example, in one 1930 case, the police intercepted an automobile and found a revolver under the driver's seat. The court, in applying the relevant standards, was compelled to release all defendants for failure to sufficiently establish possession. (*People ex rel. De Feo* v. *Warden,* 136 Misc 836.) The court remarked, however, that the case and other similar situations "establishes the urgent need

for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof. Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." (136 Misc 836.) In 1936, the Legislature took heed of this suggestion and enacted section 1898-a of the former Penal Law providing that all persons in an automobile at the time a weapon is found in the vehicle are presumed to be in illegal possession of the weapon. (L 1936, ch 390.) Although the statute did contain a number of exceptions, the statute did not except the situation where the weapon was found on the person of one of the vehicle's occupants. This exception made its appearance much later, in 1963, when the Legislature redrafted a number of contraband-related presumptions and placed them in a single section of the old Penal Law (§ 1899). (L 1963, ch 136, § 4.) However, it should be noted that at least one court had read such an exception into the statute prior to its 1963 amendment. (See *People* v. *Logan,* 94 NYS2d 681, 684.) The "upon the person" exception was carried into the present provision of the 1967 Penal Law.

The statutory presumption establishes a prima facie case against the defendant which presumption he may, if he chooses, rebut by offering evidence. Generally, the presumption will remain in the case for the jury to weigh even if contrary proof is offered but may be nullified if the contrary evidence is strong enough to make the presumption incredible. So too, if no contrary proof is offered, the presumption is not conclusive, but may be rejected by the jury. (Cf. *People* v. *McCaleb,* 25 NY2d 394; see, also, *People* v. *Leyva,* 38 NY2d 160.)

Whether the weapons were found on the person of one of the vehicle's occupants is primarily a question of fact.

Here, there was testimony that the handbag was situated on the floor of the car in the space between the front seat and the car door. The argument that the pocketbook was a part of Jane Doe's person is not an unattractive one, given the fact that women and men in our society often use handbags and purses to carry and store personal items of many kinds and are generally held directly by the hand or arm or are placed within easy reach. However, the placement of a weapon in a handbag does not necessarily indicate that the owner of a handbag is in sole and exclusive possession of the weapon. Whether the owner of the handbag is the sole possessor of the weapon depends upon the access to the bag that others may have and whether the others have knowledge of its contents. Similar reasoning might well be applied to briefcases, shopping bags with groceries, cartons, suitcases, or the myriad of other things that people frequently carry or transport. To hold that merely because the weapons were found in a briefcase, handbag, shopping bag or carton the presumption is nullified would defeat the legislative intent and render the statute nugatory. Astute illegal possessors of weapons then would only need to carry weapons in any kind of personalized containers to successfully evade joint responsibility. There would be added difficulty, not present in this case, of ascribing ownership of the container to one of the passengers, a matter that might be resistant to proof where the container itself reveals no information to identify its owner or where the owner of the container is not present in the vehicle at the time of apprehension. Surely this kind of rationale would return the law to the early days of this century when law enforcement was easily frustrated by an automobile shell game reminiscent more of vaudeville than of the courts. To be sure, there may be circumstances

where the evidence is clearcut and leads to the sole conclusion that the weapon was found upon the person. For example, the exception would have clear application where the weapon is secreted under one person's shirt or under other items of clothing or in a pocket. (See *People v Garcia,* 41 AD2d 560; *People v Davis,* 52 Misc 2d 184 [J. Irwin Shapiro, J.].) Absent this kind of clear indication that the weapon was actually upon the person of one occupant, the question of the presumption's applicability is properly left to the trier of fact under an appropriate charge. Only the trier of fact, after hearing all the testimony and assessing the credibility of witnesses, can determine the factual issues of access and the degree to which possession is personalized. As in this case, the precise location of the container may be a critical factual issue. Although some may draw different inferences from the nature of the container and its placement, those inferences, based as they are on contested facts, are generally to be drawn by juries and not by appellate Judges.

It should be noted that defendants did seek to have the case dismissed, after the close of the People's case, on the ground that the presumption did not apply. The trial court denied the motion, apparently accepting the prosecutor's argument that the applicability of the presumption was a question of fact for the jury. However, the trial court never charged the jury with respect to the "on the person" exception. Nevertheless, the defense did not except to the absence of this language in the court's charge. As a result, what we view as a jury question was never presented to the jury and for the reasons stated we cannot conclude in this case that as a matter of law the presumption was inapplicable.

The order of the Appellate Division should be affirmed.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

JONES, J. (concurring). I agree that the order of the Appellate Division should be affirmed and the convictions of all four defendants sustained.

At the close of the People's case defense counsel moved for dismissal on the ground that the presumption of subdivision 3 of section 265.15 of the Penal Law was not applicable because the case fell within the express exception of the statute, and that in its absence there was insufficient evidence to support a conviction. The trial court denied this motion. Although the point is not pressed on the appeal to us, in my view the denial was not erroneous; whether in consequence of the exception the presumption was not available was a question later to be left to jury determination. To this extent I agree with the views expressed in the majority opinion.

At the conclusion of the entire case, however, the Trial Judge charged the jury that "upon proof of the presence [in the automobile of] the hand weapons, you may infer and draw a conclusion that such prohibited weapons were possessed by each of the defendants who occupied the automobile at the time when such instruments were found". But no reference was made in the charge to the statutory provision that the presumption would not apply "if such weapon • • • is found upon the person of one of the occupants". No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case.

Accordingly, in the procedural posture in which these verdicts of guilty were returned there can only be an affirmance.

Appendix D—Decision of the Court of Appeals of the State of New York, Dated July 15, 1976.

WACHTLER, J. (concurring in part and dissenting in part). I concur with the majority in concluding that defendant Lemmons' motion to suppress the two handguns should have been denied on the ground that the trial court found that these weapons were in "plain view". However I cannot agree that the convictions of Lemmons, Hardrick and Allen, for possession of the weapons found in defendant Doe's handbag should be affirmed.

Initially, I would note that the applicability of the presumption was put squarely in issue by the defendants. At the close of the People's case defendants, Lemmons, Hardrick and Allen, moved to dismiss the indictments on the ground that the statutory presumption of possession was negated by the uncontradicted proof that the weapons were at all times on the person of defendant Doe. Defendants strenuously contended that the handbag was her exclusive personal property and she alone exercised dominion and control over it. The record reveals that the court and the parties engaged in a lengthy colloquy on this specific point. In light of this pointed, thorough challenge to the operation of the presumption I believe that the issue was properly preserved and that the failure to object to the charge to the jury had no effect whatsoever with respect to preservation.

In my view the application of the presumption (Penal Law, § 265.15, subd. 3) arising from presence in an automobile in which a firearm is found was erroneous. The statute provides that the presence of a firearm in an automobile is presumptive evidence of its possession by all persons occupying the automobile, "except • • • if [it] is found upon the person of one of the occupants". I would conclude that, as a matter of law, the handguns in this instance were found "upon the person" of Jane Doe within the contemplation of the statute.

In order to be convicted of the crime of possession of a firearm, the People must establish beyond a reasonable doubt that the defendant had physical or constructive possession of a firearm (Penal Law, § 265.15, subd 1; § 10.00, subd 8). In instances where several individuals are involved, none of whom has clear-cut dominion over the contraband, the task of the People is particularly difficult. Nowhere is this more difficult than where the individuals are situated in a motor vehicle (*People ex rel. De Feo v Warden,* 136 Misc 836). In response to this problem the Legislature in 1936 enacted a presumption of possession applicable to all persons present in an automobile at the time a weapon is found in the vehicle (L 1936, ch 390). The purpose of this presumption was articulated in *People v Logan* (94 NYS2d 681, 683-684): "As with other presumptions, however, the presumption here being considered is a rule of necessity. It is to be invoked only if, under the circumstances involved, there is an absence of satisfactory evidence of the ultimate fact to be established, to wit: To which of the occupants is 'possession' attributable? Obviously, therefore, if the undisputed facts of any given situation establish that the gun is *actually* possessed by any *particular* individual or individuals occupying the automobile, there is then no burden under section 1898-a imposed upon the remaining occupants of such car to go forward with proof tending to refute the presumption which would otherwise attach by virtue of occupancy. The positive evidence of actual possession in such case would wholly dissipate the necessity for the invocation of the statutory presumption."

This provision was carried forward when the Penal Code was revised (L 1965, ch 1030) and was amended to provide an exception for weapons "found upon the person of one of the occupants" (Penal Law, § 265.15,

subd 3, par [a]). Constitutional challenges claiming that this presumption amounts to a denial of due process have been rejected (*People v Terra,* 303 NY 332; *People v Russo,* 278 App Div 98, affd 303 NY 673). In general, presumptions of this type are constitutional provided "based on life and life's experiences, a rational connection between the fact proved and the ultimate fact presumed may be said to exist" (*People v Terra, supra,* at p 335; *Tot v United States,* 319 US 463; *Leary v United States,* 395 US 6; *People v McCaleb,* 25 NY2d 394; *People v Leyva,* 38 NY2d 160; see, generally, McCormick, Evidence, § 313). Certainly it is rational to infer from a person's presence in an automobile that he has actual or constructive possession over a weapon found in that vehicle. However, this statement is not true when the proof at trial establishes that the weapon is in the exclusive possession of one of the occupants. So, where a weapon is discovered in a passenger's vest pocket there will flow no rational belief that the driver is in possession of that weapon.

The same analysis applies where the weapon is found in a place which is but an extension of a particular individual. Here the weapon was found in a woman's handbag which was located within her natural and easy reach and defendant Doe, who was the only woman in the vehicle, expressly admitted that it was her possession. An inference that all the occupants possessed these weapons hardly follows, naturally and rationally, from these circumstances. Common experience teaches that a woman's pocketbook is but an extension of her pockets; intended to hold items which she cannot or prefers not to keep in her clothing. As such, a woman's handbag generally contains highly personalized items exclusively controlled by the owner and is markedly different from other receptacles, like shopping bags or cartons, which in common experience do not communicate the same exclusivity as a woman's handbag. In addition, this

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situation is clearly analogous to those cases where a search of the defendant's attaché case or similar item within his exclusive control is sustained as incident to a valid arrest (e.g., *People v Weintraub*, 35 NY2d 351; *People v Pugach*, 15 NY2d 65).

Equally important is the accompanying fact that this pocketbook was positioned within the easy and natural reach of its owner; it was also literally only within her easy reach and not that of any of the other passengers. Thus it was on the floor, a not unnatural placement, and between her legs and the right-hand passenger door. It was not, for instance, between Jane Doe and one of the other occupants, either on the seat or on the floor. In this combination of critical circumstances, when there was but one woman's pocketbook and but one woman in the car, who readily acknowledged that the pocketbook was hers, I would find the statutory presumption inapplicable. Indeed, this conclusion is inescapable in light of the historical origin of this statute as formulated within due process requirements. Convictions for possession of weapons simply cannot stand solely on the strength of a presumption where the fact presumed, i.e., physical or constructive possession, does not flow rationally from the evidence presented.

Although the inapplicability of the presumption here mandates reversal, that does not end the matter. Wholly apart from the presumption the People may establish that these defendants did actually exercise dominion and control over the handguns. The presence of the weapons in the vehicle coupled with other evidence presently in this record might well furnish a basis for a jury to infer logically that these defendants constructively possessed the weapons found in her handbag. Accordingly, the orders should be modified by reversing and granting a new trial as to all defendants except Jane Doe and otherwise affirmed.

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FUCHSBERG, J. (concurring in part and dissenting in part). For the reasons stated in Judge WACHTLER's concurring opinion, my vote is also for modification. However, in view of the fact that, despite a full trial, there appears to have been no evidence of control of the guns developed other than that set forth in the several opinions on this appeal, the appropriate corrective action should be dismissal for legal insufficiency of trial evidence (CPL 470.40, subd 1; 470.20, subd 2; cf. *Stubbs v Smith*, 533 F2d 64 [OAKES, J.]).

Chief Judge BREITEL and Judges GABRIELLI and COOKE concur with Judge JASEN; Judge Jones concurs in result in a separate opinion; Judge WACHTLER concurs in part and dissents in part and votes to modify and order a new trial as to all defendants except Jane Doe in a separate opinion; Judge FUCHSBERG concurs in part and dissents in part and votes to modify and dismiss the indictment as to all defendants except Jane Doe, in another separate opinion.

Order affirmed.

Appendix E—Statute Involved:

New York Penal Law § 265.15.

§ 265.15 Presumptions of possession, unlawful intent and defacement

1. The presence in any room, dwelling, structure or vehicle of any machine-gun is presumptive evidence of its unlawful possession by all persons occupying the place where such machine-gun is found.

2. The presence in any stolen vehicle of any weapon, instrument, appliance or substance specified in section 265.05 is presumptive evidence of its possession by all persons occupying such vehicle at the time such weapon, instrument, appliance or substance is found.

3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.